Easter Seals Connecticut, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376. Cases 34–CA–10401 and 34–CA–10469

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 26, 2004, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions[1] and a supporting brief, the Respondent filed an answering brief and a motion to strike the General Counsel's exceptions and brief,[2] and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

Introduction

The judge concluded that the complaint should be dismissed in its entirety. He found that the Respondent did not violate: (1) Section 8(a)(1) of the Act by establishing a policy requiring employees to bring their problems and complaints to the attention of management; (2) Section 8(a)(1) and (3) of the Act by disciplining employee Caraballo-Mendez pursuant to that policy; (3) Section 8(a)(1) and (3) by constructively discharging Caraballo-Mendez. Although we find that the policy was facially valid, we reverse the judge and find that the Respondent violated Section 8(a)(1) by its over-broad application of the policy to discipline Caraballo-Mendez for discussing terms and conditions of employment with other employees.[4] As more fully explained below, we agree with the judge and find no constructive discharge.

Factual Background

The facts, as set forth more fully in the judge's decision, are as follows.

In the fall of 2002, Respondent Easter Seals Connecticut was awarded a Federal grant to run a new Head Start program in Meriden, Connecticut. Prior to the Respondent's selection, the Head Start program in Meriden had been run by the Community Development Institute (CDI). The United Auto Workers, Local 375 (the Union) had represented CDI's employees. When the Respondent took over the Head Start program, it encouraged all unit employees to apply for positions with the Respondent.

Teacher Jennifer Caraballo-Mendez, a former teacher and union steward at CDI, was hired by Respondent in January 2003. At the time of her hire, she received a copy of the Respondent's personnel policies. Section F of the policies, titled "Conduct," states, in part, that "[a]ppropriate attire, speech, and behavior are essential to the work" performed by Respondent. The policies prohibit several types of employee conduct, including abusive language and insubordinate behavior. Section P of the policies, titled "Employee Concerns," states, in relevant part, that "should an employee have a concern that is not resolved, he/she should put such in writing to his/her supervisor . . . ."

Consistent with her regular practice of discussing the Respondent's policies with all new employees, Manager Karen Rainville met with Caraballo-Mendez on January 31, 2003, and emphasized that Caraballo-Mendez was to bring any problems directly to her. Rainville explained that she held such meetings in an attempt to avoid problems that had existed in the prior Meriden Head Start program, and to ensure that the new program operated in a professional manner.

On the morning of February 7, 2003, it was snowing as Caraballo-Mendez reported to work. As the snow continued to fall, she began to worry aloud about having to pick up her daughter from an off-site day care facility. Caraballo-Mendez, who does not like driving in bad weather conditions, ultimately decided to leave work

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to hire Martha Pappas.

[2] The Respondent has moved to strike the General Counsel's exceptions and brief on the grounds that they do not fully comply with the requirements of Sec. 102.46 of the Board's Rules and Regulations. We find that the General Counsel's exceptions and brief together sufficiently designate the General Counsel's points of disagreement with the judge's decision. Accordingly, the Respondent's motion to strike is denied.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility determinations, we note that the judge mistakenly attributed some of Karen Rainville's testimony to Beverly Malinowski, who did not testify at the hearing.

[4] We agree with the judge that there is no evidence that the discipline was motivated by antiunion animus. Further, there is no evidence that Caraballo-Mendez' terms and conditions of employment changed as a result of the issuance of the written warning. Accordingly, we concur in the dismissal of the 8(a)(3) allegation.

early. After Caraballo-Mendez left, other employees reported to Rainville that Caraballo-Mendez had made certain comments including "I don't give a shit what they say, I'm going home," and "I'm going to have Karen Rainville's job. She doesn't know what she is doing[;] who hired her?"

On February 10, 2003, several CDI employees who had not been hired by Respondent began picketing outside of the State Street location of Respondent's operations. That same day, Caraballo-Mendez and employee Carlos Mercado had a conversation prompted by Mercado's criticism of the picketers, including his assertions that the picketers had not applied for positions with Respondent and, in any event, were not qualified for the new positions. In response to Mercado's critical comments, Caraballo-Mendez defended the picketers, stating that the picketers had in fact applied for the new positions and that some of them were more than qualified. She also criticized the Respondent's hiring procedures. Following the conversation, Mercado reported Caraballo-Mendez' comments to Head Start Director Christine Belli, who relayed the comments to Rainville.

In response to Caraballo-Mendez' comments to Mercado on February 10, 2003, as well as the comments she made before leaving early on February 7, 2003, Rainville wrote a written warning to Caraballo-Mendez. The written warning reads as follows:

> On January 31, 2003 Beverly Malinowski and Karen Rainville met with you. They reviewed procedures of the agency including the steps an employee would take should they have any concerns or complaints. You were instructed to speak directly to me should you have any concerns, or in my absence speak to Karen Rainville or Beverly Malinowski. These grievance procedures are outlined in your personnel policies.
>
> On January [sic] 7, 2003 you made comments to the Bus Driver and your peers stating: "I don't give a shit what they say, I'm going home", "I'm going to have Karen Rainville's job. She doesn't know what she is doing, who hired her?" [punctuation errors in original] These comments are in direct violation of conduct expectations as outlined on page 8 of your personnel policies.
>
> On February 10, 2003 you made several negative comments in the Head Start work room regarding Easter Seals. Comments included statement that "Easter Seals is unfair in its hiring", "something fishy is going on", and "staff were hired without interviews". [punctuation errors in original] It is inappropriate for you to make such comments, and again, the procedure is for an employee to take all concerns to the Director.
>
> Based on your repeated violations of agency policies, I am issuing this formal written warning. This is very serious; you can be terminated for this kind of conduct. We expect your conduct to change and must see immediate improvement. Your supervisor will monitor this situation closely.

On February 12, 2003, Caraballo-Mendez met with her supervisor, Filomina Montayne, and Belli, who presented her with the written warning. Caraballo-Mendez made a few comments about the warning, asked who had made the allegations, then signed it.

On the morning of February 13, 2003, Beverly Malinowski, a statutory supervisor, visited Caraballo-Mendez' classroom for a few minutes.[5] Later that same day, Caraballo-Mendez informed Montayne that she wanted to resign effective immediately, due to the "aggravation" she had felt over the past 3 days. Montayne urged her to reconsider and asked her, at a minimum, to wait to speak to Belli before making a final decision. Caraballo-Mendez refused and submitted her letter of resignation.

The Judge's Decision

The judge concluded, inter alia, that the Respondent did not violate Section 8(a) (1) of the Act by the inclusion of the third paragraph of the warning. For the reasons that follow, we find that this aspect of Caraballo-Mendez' warning violated Section 8(a)(1) of the Act.

The judge also concluded, inter alia, that the Respondent did not violate Section 8(a)(3) and (1) of the Act by constructively discharging Caraballo-Mendez. We adopt the judge's findings in this regard, for the reasons set forth in his decision as well as those contained in the additional discussion set forth below.

[5] Regarding this visit, our dissenting colleague writes, "Just as the letter had warned, Malinowski visited Caraballo-Mendez' classroom for the purpose of observing her." We take issue with this characterization in two regards. First, the disciplinary letter informed Caraballo-Mendez that *her* supervisor would be monitoring the situation. Malinowski, however, was not Caraballo-Mendez' supervisor. Second, the record does not contain any testimony concerning the purpose of Malinowski's visit, and Karen Rainville's uncontroverted testimony was that Malinowski frequently visited classrooms.

Furthermore, contrary to our dissenting colleague, we do not believe that the judge's finding that Caraballo-Mendez had an "ultra sensitive personality" that "seriously affect[ed] her objectivity" is irrelevant to a determination of whether Caraballo-Mendez was, in fact, faced with a "Hobson's Choice" or whether, instead, her resignation arose from a personal, extreme reaction to being disciplined.

Analysis

The Disciplinary Letter

It is well settled that "[u]nder Section 7 of the Act, employees have the right to engage in activity for their 'mutual aid or protection,' including communicating regarding their terms and conditions of employment." *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)). The issue presented here is whether the Respondent's policy unlawfully interfered with employees' Section 7 right to discuss their terms and conditions of employment. We hold that, although the policy was lawful as written, the Respondent's application of its policy resulted in an unlawful infringement of employee Caraballo-Mendez' Section 7 rights.

On its face, the Respondent's policy is lawful because it does not interfere with the employees' statutory right to discuss, among themselves, their terms and conditions of employment. The policy says that employees who have "a concern that is not resolved" should put it in writing and submit it to their supervisors. Assuming, arguendo, that this is a requirement, the policy does not say that this is the *only* step that can be taken by the employee. Indeed, the policy is silent regarding employees' ability to discuss any problems or complaints with other employees and does not impose any limitations whatsoever on such discussions. Accordingly, we do not find that the policy, as written, unlawfully interferes with the employees' Section 7 right to discuss, among themselves, terms and conditions of employment.[6]

The Respondent did, however, unlawfully interfere with Caraballo-Mendez' Section 7 rights by its overbroad application of the policy to discipline her for making certain comments to Mercado on February 10. In its written warning, the Respondent reprimanded Caraballo-Mendez for telling Mercado that "Easter Seals is unfair in its hiring," "something fishy is going on," and "staff were hired without interviews."[7] Specifically, the Respondent told Caraballo-Mendez that "[i]t is inappropriate for you to make such comments, and again, the procedure is for an employee to take all concerns to the Director." Caraballo-Mendez' comments contrasted the Respondent's refusal to hire the pickets with the Respondent's hiring of others. Thus, the Respondent's warning directly reprimanded Caraballo-Mendez for discussing the Respondent's hiring practices with another employee. Accordingly, that discussion concerned terms and conditions of employment and was protected by Section 7 of the Act. By warning and threatening to terminate Caraballo-Mendez for engaging in protected Section 7 activity, the Respondent violated Section 8(a)(1) of the Act. See *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624–625 (1986); *Coca-Cola Co.*, 254 NLRB 823, 824 (1981), enfd. 670 F.2d 84 (7th Cir. 1982).

To remedy this violation, we shall order the Respondent to expunge its February 12 warning letter to Caraballo-Mendez.[8]

Caraballo-Mendez' Resignation

Our colleague asserts that Caraballo-Mendez was faced with a "Hobson's Choice," i.e. to give up Section 7 rights or face discharge. She would find that Caraballo-Mendez was forced to quit rather than have to choose between these two unacceptable alternatives.

Contrary to our colleague, we agree with the judge that Caraballo-Mendez' decision to resign did not result from a "Hobson's Choice" situation. In addition to the reasons cited by the judge, we find it telling that, in explaining the reasons behind her decision to resign, Caraballo-Mendez did not indicate that her decision was based on her concern that, in order to keep her job, she would be required to forgo her right to engage in protected activity. Although Caraballo-Mendez was unhappy that she was disciplined, in part, for speaking her mind at the workplace, we find that a consideration of her testimony as a whole establishes that her unhappiness was not rooted in a concern that her employer was interfering with her ability to engage in protected conduct. Rather, it was centered on a number of different complaints, none of which were related to a "Hobson's Choice."[9]

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[6] *Kinder-Care Learning Centers*, supra, cited by the General Counsel, is distinguishable. There, the policy at issue required that employees bring their complaints to management before they could discuss them with anyone else. Accordingly, that policy, by its terms, placed limitations on the employees' ability to discuss their terms and conditions of employment with others. Id. at 1172. Here, by contrast, the Respondent's policy does not place any constraint on employees' ability to exercise their Sec. 7 rights.

[7] In the second paragraph of the warning, the Respondent disciplines Carabello-Mendez for making the comments of February 7. We conclude that the comments of February 7 were insubordinate and not protected by Sec. 7. Accordingly, that portion of the letter is lawful.

[8] In light of our finding that Caraballo-Mendez was not constructively discharged, and consequently will not be reinstated—i.e., she currently does not, and will not as a result of this decision, work for the Respondent—we find it unnecessary to pass on whether Respondent could prepare a new warning letter for Caraballo-Mendez that excludes references to protected activity.

[9] It is worth noting that the judge explicitly discredited Caraballo-Mendez' testimony "except where she [made] admissions against her interest, or the facts are not disputed." Accordingly, our dissenting colleague's reliance on Caraballo-Mendez' testimony in establishing a "Hobson's Choice" constructive discharge violation is not warranted. Contrary to our colleague, we do not believe that the judge's incorrect legal conclusion that the warning to Caraballo-Mendez was lawful undermines his credibility resolution as to her testimony. In any event, our reading of Caraballo-Mendez' testimony, as a whole, would not support such a violation.

First and foremost, Caraballo-Mendez repeatedly testified that her decision to resign was based on her unhappiness that she had been disciplined without being "given the chance" to tell her side of the story.[10] She was upset that Belli had chosen to "utterly just believe" the "hearsay" statements of others and that she had decided to take action against Caraballo-Mendez without first giving her the opportunity to "give her an explanation." In addition, Caraballo-Mendez felt that she had been treated unfairly. She complained that Respondent did not "take [her] feelings into consideration" and that, once the picketing started, "they should have just said that no one was allowed to comment about it." Finally, Caraballo-Mendez was unhappy because she believed that the discipline she received had been too severe; she testified that she should have only received a verbal warning, instead of a written warning, in response to her conduct.

Thus, although we have found that the Respondent's disciplining of Caraballo-Mendez violated the Act, we decline to find that the issuance of a written warning created a "Hobson's Choice" that left her no alternative but to resign. As discussed, Caraballo-Mendez' subjective reason for resigning was not based on her concern that she was faced with a "Hobson's Choice" dilemma, but rather was based on her hurt feelings arising from her perception that she had been treated unfairly. In addition, Montayne, her supervisor, urged Caraballo-Mendez to reconsider her decision to resign. Such conduct is inconsistent with a Respondent desire to force a choice on her. We would find it inappropriate to hold an employer accountable for having constructively discharged an employee under a "Hobson's Choice" analysis where the employee's own testimony establishes that her decision to resign was not, in fact, based on any "Hobson's Choice," "either/or" dilemma but rather on some other fact altogether. See *Intercon I (Zerom*), 333 NLRB 223 (2001) (stating the rule that a Hobson's Choice violation is warranted where an employee "quits rather than comply" with the employer's unlawful condition).[11]

To the extent that our colleague suggests that a threat to discharge (unless Section 7 rights are foregone), followed by a resignation, necessarily means that the resignation was caused by the threat, we disagree. Such a contention would present the classic fallacy of "post hoc ergo propter hoc (after this, therefore because of this)." The fallacy is illustrated here by the fact, that, as discussed, Caraballo-Mendez quit because of other considerations.

Finally, contrary to our colleague's assertion, we find that the General Counsel, who has the burden of establishing the violation, failed to establish that the threat to Carabello-Mendez was causally related to her resignation. And we disagree with the dissent to the extent she places the burden of proof on the Respondent to show the absence of a causal relationship.

ORDER

The National Labor Relations Board orders that the Respondent, Easter Seals Connecticut, Inc., Meriden, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or threatening to terminate any employee for discussing terms and conditions of employment with other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful discipline of Jennifer Caraballo-Mendez and notify her in writing that the discipline will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its Meriden, Connecticut center copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[10] It should be noted that, as the judge found, Caraballo-Mendez was given the opportunity to present her side of the incidents during the February 11 meeting with Montayne and Belli, but chose not to.

[11] Because we find that Carabello-Mendez voluntarily resigned her employment for reasons unrelated to protected Sec. 7 activity, we need not pass on the validity of the "Hobson's Choice" theory of constructive discharge posited in the cases cited by our dissenting colleague. Member Schaumber notes that in other contexts, Federal courts repeatedly have insisted on "carefully cabin[ing] the theory of constructive discharge, '[b]ecause [such] claim[s] [are] so open to abuse by those who leave employment of their own accord.'" *Honor v. Booz-Allen & Hamilton, Inc*., __F.3d __ (Case No. 03–2076, 4th Cir., 2004) (Title VII) (quoting *Paroline v. Unisys Corp*., 879 F.2d 100, 114 (4th Cir. 1989)). The dissent would do the opposite, extending what is already an extension of the constructive discharge theory beyond the narrow confines previously contemplated by the Board. Cf. *ComGeneral Corp*., 251 NLRB 653, 657–658 (1980) (recognizing Hobson's choice doctrine only in the narrow circumstances where an employee is confronted with a "clear and unequivocal" choice of remaining employed or foregoing fundamental Sec. 7 rights.).

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Before she resigned, employee Jennifer Caraballo-Mendez was presented with a classic Hobson's Choice: either give up exercising her statutorily-protected right to discuss employment conditions with her coworkers or be discharged. Under established Board law, this was an unlawful constructive discharge. The judge erred, then, in focusing on factors that are relevant to a different category of constructive-discharge cases, which turn on whether an employer has imposed intolerable working conditions that do not directly implicate a statutory right. The majority fails to correct this error, despite correctly finding that the Respondent unlawfully warned Caraballo-Mendez. The majority insists that Caraballo-Mendez quit for unrelated reasons.

I.

The relevant facts are undisputed. Just prior to the events underlying this proceeding, the Respondent took over a Head Start program that earlier had been operated by another employer whose workforce was unionized. The Respondent's manager, Karen Rainville, who had worked for the prior employer in a management position, testified that there had been a long history of trouble with this Head Start program as it had previously operated, and that she wanted to put "every procedure in place to ensure our success with the program." The Respondent's personnel policy manual, which was given to Caraballo-Mendez, includes a description of the Respondent's internal grievance process.[1] As found by the judge, Rainville met with Caraballo-Mendez on January 31, 2003,[2] as she did with all new employees, to provide her with the policy manual, and to emphasize that she should speak with Rainville directly if she had a problem.[3]

Rainville further testified that on February 10 she learned of Caraballo-Mendez' purportedly unprotected conversations with employees on February 7, as a result of information provided by two employees.[4] She testified that after she spoke with these employees, she took no action other than to make Head Start Director Christine Belli "aware of the situation." On the next day, however, she learned that Caraballo-Mendez had been discussing terms and conditions of employment with employee Carlos Mercado, specifically, that she had been making critical comments about the Respondent's hiring practices. At that point, Rainville brought both of these instances to the attention of Vice President Beverly Malinowski, and the decision was then made to issue the written warning here in question. Rainville testified that Caraballo-Mendez' conduct was inappropriate and that it was undermining her authority, particularly considering her efforts to ensure a "positive professional environment." Rainville specifically testified that that "what occurred was not professional" because "it didn't follow the procedures outlined in our personnel policies for staff when they have a concern."

The next day, Caraballo-Mendez was issued the warning letter quoted in full by the majority. This letter included references to "negative comments" made by Caraballo-Mendez to Mercado regarding the Respondent's hiring practices. The letter also categorically states, "It is inappropriate for you to make such comments, and again, the procedure is for an employee to take all concerns to the Director." The letter closes with the following warning:

> Based on your repeated violation of agency policies, I am issuing this formal written warning. This is very serious; you can be terminated for this kind of conduct. We expect your conduct to change and must see immediate improvement. Your supervisor will monitor this situation closely.

[1] Neither the complaint nor the General Counsel's exceptions allege that the grievance procedure is unlawful as written. On this basis, I concur in the majority's decision not to find the procedure is unlawful.

[2] All dates are 2003 unless otherwise indicated.

[3] This January 31 exchange is also not alleged as unlawful, either in the complaint or in the General Counsel's exceptions.

[4] For the purposes of this dissent, I will assume arguendo that no aspect of the February 7 conversation involved protected, concerted activities.

Just as the letter had warned, Malinowski visited Caraballo-Mendez' classroom the next day for the purpose of observing her.

Early that afternoon, Caraballo-Mendez informed her supervisor, Fil Montanye, that she wanted to resign. Caraballo-Mendez testified without contradiction that she told Montanye that she was resigning because of the "aggravation of those past three days," that she was being treated unfairly, and that they should have tried to resolve it in a different manner instead of giving her a written warning. At the hearing, Caraballo-Mendez testified that the situation was difficult for her because of the way she was being treated:

> [T]he letter states that I'm going to be monitored in that, you know, I need to change my, my behavior, and my supervisor was going to be monitoring me. It was true. I mean, the following day, Beverly [Malinowski] was in the classroom. She, and I knew that that was, if I stayed that that was going to be my constant, every day probably, you know, management popping in not because they wanted to see my work with the children but just to monitor me. And I, I was not going to have that.

Caraballo-Mendez also testified that her concern over the written, as opposed to a verbal, warning, was, "if we don't follow that, that, the verbal, then you would better (sic) a written warning and so on, and so on, until your, you're let go."

Although Montanye requested that she reconsider her resignation, he made no effort to retract the ultimatum that the warning letter imposed on her. Caraballo-Mendez declined to reconsider and submitted a letter of resignation that day.

II.

I agree with the majority that the written warning to Caraballo-Mendez violated Section 8(a)(1).[5] But I would also find that Caraballo-Mendez was constructively discharged, based on the Hobson's Choice presented to her in connection with the warning.

2.

As the Board reaffirmed in *Intercon I (Zercom)*, 333 NLRB 223 (2001):

> [U]nder the Hobson's Choice line of cases, an employee's voluntary resignation will be considered a constructive discharge when an employer conditions the employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp*., 227 NLRB 612 (1976).

This is such a case.[6]

The written warning to Caraballo-Mendez disciplined her for having discussed terms and conditions of employment with a fellow employee, an essential Section 7 right. Moreover, the warning stated that this was very serious misconduct and was the kind for which she could be terminated. The warning further put Caraballo-Mendez on notice that the Respondent needed to see immediate improvement, and that her supervisor would monitor her closely.

The fact that Vice President Malinowski visited Caraballo-Mendez' classroom the next day served to reinforce the warning notice's announcement that it would be monitoring her behavior.[7] Although the Respondent contends in this proceeding that this classroom visit was unrelated to the disciplinary letter, and was merely routine monitoring of classroom performance, Caraballo-Mendez was not so informed at the time. She accordingly had no basis for disassociating the actual classroom monitoring from the threat of monitoring contained in the warning letter. From her perspective, the Respondent was simply following through on its threat to closely monitor her.

The judge's assessment of Caraballo-Mendez as having unreasonable sensitivities, and his judgment that her working conditions were not significantly changed, are simply not relevant under the Hobson's Choice analysis. Although the difficulty of the working conditions may be relevant in a case where the issue is whether there was a constructive discharge premised on onerous job assignment,[8] it has no relevance in a Hobson's Choice analysis.

[5] I do not join the majority's suggestion that a reformulated warning might be lawful. The record shows that the Respondent did not take disciplinary action for any other incident prior to the intervening protected activity, which we find triggered the unlawful warning.

[6] The majority says it does "not pass on the validity of the 'Hobson's Choice' theory of constructive discharge," but the theory has been established in Board law for decades. See, e.g., *Ra-Rich Mfg. Corp.*, 120 NLRB 503, 506–507 (1958).

[7] Unlike the majority, I do not read the warning's reference that Caraballo-Mendez would be monitored by her supervisor as limited to being solely a reference to Montanye, her *immediate* supervisor. Malinowski had a position above Montanye in the Respondent's supervisory hierarchy. Indeed, the Respondent asserts that Malinowski had a legitimate basis for observing the employee's performance in the classroom.

[8] This other type of constructive discharge is premised on a very different standard:

> First, the burdens imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976). See generally *ComGeneral Corp.*, 251 NLRB 653, 657–658 (1980), enfd. 684 F.2d 367 (6th Cir. 1982), where these two theories for constructive discharge are distinguished.

The question to be answered there is whether the employee was forced to choose between continuing to work and exercising her rights protected by Section 7.

The majority insists that "Caraballo-Mendez' subjective reason for resigning was not based on her concern that she was faced with a 'Hobson's Choice' dilemma, but rather was based on her hurt feelings arising from her perception that she had been treated unfairly." But the Respondent's unlawful ultimatum was an integral part of this unfair treatment. As Caraballo-Mendez' testimony shows, she viewed the warning as a prelude to discharge, if she did not comply. The testimony establishes the direct causal relation between the Hobson's Choice presented to Caraballo-Mendez and her decision to terminate her employment in reaction to that ultimatum. The General Counsel has not failed to show the causal link in this Hobson's Choice analysis.[9] The Respondent in turn has not established that Caraballo-Mendez would have resigned even if the written warning had never been issued. Merely pointing to her other complaints is not enough.

The judge's reliance on his finding that Caraballo-Mendez chose to resign is misplaced for similar reasons. A Hobson's Choice analysis necessarily proceeds from the factual basis that it is the employee who chooses to quit. The employer compels this choice by unlawfully conditioning continued employment on the employee's abandonment of Section 7 rights. In this case, the Respondent's threat of discharge should Caraballo-Mendez continue to exercise these Section 7 rights was indisputably clear, and no guesswork is required to determine why Caraballo-Mendez resigned. See *ComGeneral Corp.*, 251 NLRB at 657–678.[10]

The Respondent, in defense of its misconduct, relies on the fact that Montanye had urged Caraballo-Mendez to reconsider her resignation. Montanye did nothing, however, to remove the ban on talking to other employees about their terms and conditions of employment. In other words, the Hobson's Choice persisted.

Thus, the evidence demonstrates that the written warning issued to Caraballo-Mendez, which we have unanimously found to be discriminatory discipline, resulted in an unlawful ultimatum to Caraballo-Mendez, which was a direct cause for her resignation. I therefore would find that the Respondent constructively discharged Caraballo-Mendez in violation of Section 8(a)(3) and(1).

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline or threaten to terminate you for discussing terms and conditions of employment with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Jennifer Caraballo-Mendez, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discipline warning will not be used against her in any way.

EASTER SEALS CONNECTICUT, INC.

[9] The majority notes that the judge found Caraballo-Mendez not to be a credible witness "except where she makes admissions against her interest, or the facts are not disputed." That finding, however, related to the judge's assessment of Caraballo-Mendez as "ultra sensitive" in rejecting her expressions of "being threatened, surveilled and discriminated against" and in rejecting a different theory of constructive discharge. Because the judge erred in finding that the warning to Caraballo-Mendez was not unlawful—it was—his assessment of her credibility in this regard has no proper bearing on her testimony that she believed that the unlawful warning was a prelude to discharge.

[10] The judge's reliance on the Board's finding of no constructive discharge in *Central Casket Co.*, 225 NLRB 362 (1976), is misplaced on two grounds. First the rationale in that case, that an employer's threat of discharge for an employee's persisting in Sec. 7 activity should be presumed to be no more than a bluff, is directly at odds with the basic Hobson's Choice analysis in subsequent cases. Second, the Board also relied in that case on the distinguishing fact that the employee who quit gave reasons unrelated to the employer's misconduct as the reason for why the employee was absent from work, specifically, that the employee was sick.

Quesiyah S. Ali, Esq. and *Margaret A. Lareau, Esq.*, for the General Counsel.

Felix J. Springer, Esq. & Daniel A. Schwartz, Esq. (Day, Berry, & Howard, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried in Hartford, Connecticut, on October 1–2, 2003. On June 27, 2003, a consolidated complaint and notice of hearing issued alleging various allegations in violation of Section 8(a)(1) and (3) of the Act.

On September 17, counsel for the General Counsel filed an amendment to the consolidated complaint, alleging that Karen Rainville and Beverly Malinowski were Respondent's supervisors and agents under the Act, and correcting the location of a union picket line named in the consolidated complaint. On October 1, counsel for the General Counsel further amended the consolidated complaint by alleging that on February 12 and 13, Respondent, by Belli and Malinowski, imposed more onerous working conditions on Caraballo-Mendez by monitoring her activities at Respondent's facilities in violation of Sections 8(a)(1) and (3) of the Act. Respondent denied the Section 8(a)(1) and (3) allegations, but admitted the above named individuals are supervisors within the meaning of Section 2(11) of the Act.

Upon the entire record in this case, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent Easter Seals, I make the following findings of fact and conclusions of law.

At all times material herein Respondent has been a Connecticut corporation with places of business in Meriden and Wallingford, Connecticut, and is engaged in providing childcare and rehabilative services. During the 12-month period ending May 30, 2003, Respondent, in conducting its business operations derived gross revenues in excess of $250,000. During the same period Respondent purchased and received goods and materials valued in excess of $5000 directly from points outside the State of Connecticut. It is admitted, and I find, that Respondent is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

For the last decade, management of the Head Start programs in Meriden, Connecticut, had been financially troubled. In 2002 the U.S. Department of Health and Human Services sought an agency to run a new Head Start program in Meriden, Connecticut, and awarded the grant to Easter Seals in September of that year. Easter Seals subsequently hired Christine Belli, an admitted supervisor within the meaning of Section 2(11) of the Act, to lead Easter Seals' Head Start program in October 2002.

Initially, Belli worked with an outside consultant, Accello Learning, to develop a process for the hiring of teachers and assistant teachers. Belli credibly testified she wanted to "make sure that we had documentation through an interview process so we could be fair with all the candidates." Such a process would take into account the "skills, competency, and knowledge" of the individuals who sought employment. See 45 C.F.R. § 1304.52 (federal regulation requiring Head Start grantee to recruit and select dynamic, well-qualified staff who possess the "*knowledge, skills, and experience*" needed to provide high quality services to children.). Ultimately, standardized forms and interview questions were created and then used for each and every qualified candidate for the teacher and assistant teacher positions.[1]

The interview and hiring process itself had a number of stages. First, Respondent did a preliminary screening based on the job application. If an applicant met the minimum requirements for a position, including any educational requirement, Respondent would conduct a first interview where they scored the interview results, job experience, and education to get total points for that interview. After that a second interview was conducted, and the results from that second round were totaled. Then, Respondent would average both scores to get a total number. Several individuals conducted the interviews together and then calculated their interview scores separately, shortly after the interview itself. Easter Seals did not add additional points for education and experience in the second round, because it had already factored in those events in the first round. All applicants, teachers, and assistant teachers, scores were calculated the same way.

In late 2002, Martha Pappas, the alleged discriminatee herein, worked for CDI, a company that was running a Meriden Head Start program on an interim basis. Pappas applied for the position of teacher and assistant teacher at Respondent's new Head Start program in December 2002. Admittedly Pappas did not meet the requirement for a teacher position, because she did not have the appropriate degree. However, because Pappas indicated she had a valid child development associate credential (CDA), a requirement for the assistant teacher position, she was interviewed for the assistant teacher position. Easter Seals conducted interviews of Ms. Pappas on January 3 and January 10, 2003, more than a month before the Union started to picket for recognition, the Easter Seals facilities. At the second interview, Pappas submitted paperwork indicating her CDA had expired in November 2002. Respondent notified Pappas that they needed paperwork from her showing that she was renewing her CDA. Nearly 3 weeks after that request, and after additional requests by Easter Seals for such information, Pappas finally submitted such paperwork. Easter Seals considered that application to be equivalent to a valid CDA and, thus, gave her interview points for a CDA.

Pappas, however, performed poorly during her interviews, and her average, as described above, totaled a mere 41.25 points. Her scores were in stark contrast to others who were hired. For example, Chickie Acevedo—who used to work with Pappas at CDI—scored a 45, Evelyn Campos scored a 46 and

[1] I find Belli to be a credible witness. I was impressed with her demeanor. She testified in a detailed and forthright manner on both direct and cross-examination.

Shaneika Walford scored 51. Easter Seals hired each of these candidates. *No assistant teachers were hired with a score less than 45 points.*

The General Counsel falls far short of proving that Easter Seals discriminated against Pappas due to her union status. The Board, following *Wright Line*, 251 NLRB 1083 (1980), enf. granted 662 F.2d 899 (1st Cir. 1981), has set forth a three-part test that the General Counsel must fulfill to establish a discriminatory refusal to hire claim under Section 8(a)(3). Specifically, the General Counsel must show:

> (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, 331 NLRB 9, 12 (2000) (footnote omitted). Once this is established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. In this analysis, the burden nonetheless remains on the General Counsel to show that antiunion animus was a motivating factor in the decision not to hire.

Respondent concedes that the General Counsel has established the first element of its case, namely that Easter Seals was, in fact, engaged in hiring. However, the credible testimony of its witnesses and documentation evidence, establish that General Counsel has failed to meet its burden of proof on the second and third elements of such a claim.

In order to satisfy the second element of its refusal to hire claim, the General Counsel must prove that Martha Pappas "had experience or training relevant to the announced or generally known requirements of the positions for hire." *FES*, 331 NLRB at 9, 12. Here, there are two positions that Ms. Pappas applied for: teacher and assistant teacher.

Pappas admitted during her testimony that she did not possess the requisite educational requirement for the teacher position. Specifically, Ms. Pappas understood that the position required an associates degree. Because Pappas did not possess that degree, the General Counsel cannot show that Pappas met the minimum requirements for the teacher position and cannot satisfy its burden of proof. No evidence was introduced at the trial to indicate whatsoever that the requirement of an associate's degree was not uniformly applied and similarly there was no evidence that such a requirement was a pretext or sham.

As for the assistant teacher position, it is undisputed that the position required a CDA or equivalent. See, 45 C.F.R. § 1304.52 (requiring Head Start grantees to recruit and select dynamic, well-qualified staff who possess the "knowledge, skills and experience" needed to provide high quality services). For candidates who did not have a CDA, Easter Seals only required candidates to show that they had completed the necessary paperwork and course work to receive the CDA; for candidates with expired CDA's, they merely required those candidates to submit paperwork showing that they had applied for renewal. At the time of Pappas' application in December 2002 and even during her interviews in January 2003, Pappas did not possess that credential because her CDA had expired in November 2002. Until she submitted her paperwork in late January 2003, Ms. Pappas was not qualified for the position, and thus, I find that General Counsel cannot satisfy its burden on this element before that date.

Cases reviewing the *FES* decision have determined that *FES* does nothing to change the requirement outlined in *Wright Line* that the General Counsel must still provide sufficient proof of the employer's motivation. See, e.g., *Chugach Management. Services*, No. 10–CA–32024, 2002 NLRB LEXIS 441, at *55 (2002). In *Wright Line*, the Board held that General Counsel is charged with the responsibility of making a showing sufficient to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. Thus, in order to show the third element of this case, the General Counsel must still provide sufficient evidence that antiunion animus was the motivating factor in the Easter Seals' decision. *FES*, 331 NLRB at 12.

The General Counsel's argument appears to be merely that there was a union organizing campaign—or picketing for recognition of one—and that therefore there *must* have been antiunion animus in Easter Seals' failure to hire Ms. Pappas. However, the mere fact of an organizing campaign is insufficient evidence to imply an inference of antiunion animus. *Rondout Electric*, 329 NLRB 957 (1999); "Mere suspicion will not do." *Borin Packing*, 208 NLRB 280, 281 (1974); *Monmouth College*, 204 NLRB 554 (1973). There is no evidence that Easter Seals was concerned with the picketing or antagonistic to the Union's picketing.[2]

The evidence is to the contrary. Easter Seals encouraged all union members to apply for positions, and notified the Union of the encouragement. Moreover, when confronted with picketing, Easter Seals met voluntarily with the local police and the Union to ensure that it did not interfere with the Union's picketing. There is no evidence that it displayed any antiunion animus whatsoever. Similarly, the General Counsel did not present any evidence that Pappas' interviews or the decision not to hire her were at all tainted with antiunion animus. Thus, I find General Counsel has failed to meet its burden of proof on this essential element, and accordingly, I conclude General Counsel has failed to establish a prima face case.

Assuming arguendo that General Counsel has satisfied its burden of proof on the failure to hire issue, this does not end the inquiry. An employer can defeat such a claim by showing

[2] Indeed, the General Counsel conceded that there was no "particular activity" that Pappas engaged in for which Easter Seals singled her out. See Tr. 191–192. Rather, the General Counsel stated, "we would argue that in the period in which Ms. Pappas made her application, the Respondent was particularly heightened to issues involving the union." When pressed, the General Counsel did not have any specifics, but stated that its argument was that it was "the picketers, the union in general." It is exactly this type of argument that has been discounted by the Board. *Borin Packing Co.*,supra; *Monmouth College*, supra, enfd. 491 F.2d 752 (3d Cir. 1974). Regardless, the picketing of Easter Seals' facilities did not occur until nearly 1 month after Pappas' interviews.

that it would not have hired the applicant "even in the absence of [their] union activity or affiliation." *FES*, 331 NLRB at 12. Respondent can do so by showing that the applicants were not qualified for the positions it was filling or were otherwise not going to be selected. Id.; see also, *Houston Distribution Services*, 227 NLRB 960 fn. 2 (1970), enfd. 573 F.2d 260 (5thCir. 1978). (Respondent did not discriminate in failing to hire individuals who failed to seek out interviews, sought jobs that were not available, failed to show up for interviews or were unfit for immediate employment).

In this case, Pappas' interview scores were significantly lower than each of the hired applicants. Importantly, the interviews were done *before* there was even a hint of picketing by the Union. These interviews, which were based on the same questions given to all applicants, demonstrated that Pappas was not as well-suited for the position of assistant teacher as was her competition; her points were low. Her average score was 41.25 points, while no one under 45 points was hired. Thus, even if union animus somehow was shown, Pappas would not have been hired because her interview scores were lower then *every* applicant who was hired. The facts establish that union members with interview scores of 45 and above *were* hired by Easter Seals. The interview reports and applicant logs which were used by Belli establish that any union applicant or other applicant, who reached 45 or over on the interview scores was hired. Accordingly, I conclude that Respondent meet its *Wright-Line* burden.

The Union Picketing and Activities of Jennifer Caraballo-Mendez

On February 10, 2003, the Union began recognition picketing outside of the State Street location of the Easter Seals Connecticut, Inc. requesting recognition by Easter Seals. Later that day, representatives from the Union, including Joseph Calvo, and representatives from Easter Seals, namely Karen Rainville, early care and education manager, and Beverly Malinowski, vice president of medical rehabilitation and children's services, admitted supervisors as defined in Section 2(11) of the Act, met with members of the Meriden police department. During that meeting, the Meriden police instructed the Union and Easter Seals about the law applicable to picketing and distributed a handout to that effect.

Relying on that meeting and the materials distributed at that meeting, Rainville met with Easter Seals' Head Start Director Christine Belli, also an admitted supervisor within the Act. In that meeting, Rainville relayed the information from the police and instructed Belli that picketers "were allowed to do a full revolution in front of the vehicles, that staff would have to wait for that before they could enter into or out of the parking lot, that staff during their free time were free to do whatever they choose, but on work time their focus was needed to be on kids and families." Rainville expected Belli to convey that information to her staff. Belli met with her Education Coordinator Fil Montanye, an admitted supervisor within the meaning of Section 2(11) of the Act, and a friend of Mendez from their prior employment at Respondent's predecessor, who now supervised Mendez, and instructed her on the policy. Belli instructed Montanye that Easter Seals was "to allow . . . picketers to have one full rotation in front of our vehicles and that at no time are we to give any hand gestures to them because they could be misinterpreted in any way and that she told me that we're not to socialize with them during work time, that during breaks and on people's own time, that it was their business." Belli instructed Montanye to tell her teaching staff of this protocol.

Montanye credibly testified that she first addressed Mendez around 8 a.m. because Mendez was the first to arrive. She told Mendez the same information that was conveyed to her by Belli. Mendez admits that such a conversation took place and confirms that the prohibitions on communicating with picketers mainly dealt with hand gestures when driving through the picket line. More importantly, Mendez admitted that Montanye told her that any limitation on communicating with picketers was restricted only to worktime. Mendez testified that she understood that what she did on her own time was not at all being restricted and was "okay" by Easter Seals. In fact, later that same day, Mendez went out to the picket line to talk with the picketers. There is no evidence that she was disciplined for such conduct.

General Counsel contends that Easter Seals implemented a blanket rule prohibiting its employees from communicating with the union picketers entirely. However, the undisputed evidence, establishes that whatever limitations Easter Seals placed on its teachers and teacher assistants, such limitations were limited strictly to worktime. In this regard, Mendez, who is the subject of the charge, admitted that she understood that narrow limitation in the rule. Thus, I conclude the General Counsel's contention failed on factual grounds and thus she has not proven that Easter Seals had a blanket rule prohibiting all communications with union picketers, as alleged.

To the extent that the General Counsel claims that the actual rule implemented by Easter Seals violates the Act, such an argument also fails. I could find no case where the Board held that restrictions prohibiting communicating with picketers during working time were found to be a violation of the Act. Nevertheless, the Board—in reviewing solicitation prohibitions—has outlined a test to follow when reviewing employer rules. "The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. 'Working time is for work' is a long-accepted maxim of labor relations." *Our Way, Inc.*, 268 NLRB 394 (1983) (citations omitted). To be valid, an employer's rule must incorporate a clear statement of its scope and limitation and can be limited to "working areas" or "working time." *Albertsons, Inc. v. NLRB*, 161 F.3d 1231,1236 (10 Cir. 1998). However, a rule which is presumptively valid may violate the Act if it is applied in a discriminatory fashion. *Opryland Hotel*, 323 NLRB 723 (1997); *Reno Hilton Resorts*, 320 NLRB 197 (1995); *Emergency One, Inc.*, 306 NLRB 800 (1992).

In the instant case, it is undisputed that any restrictions that were placed on employees were narrow and limited to working time—i.e., time when the employee was working and not on any breaks. First, Easter Seals imposed a rule that prohibited employees from leaving the facility during working time. However, such a rule was applied to all of its teachers and assistant teachers—not simply those that were former union members. Easter Seals runs classrooms with 3 and 4 year olds

who, *by law*, must be supervised. Specifically, the Head Start performance guidelines by the federal government require that "Grantee and delegate agencies must ensure that all staff, consultants, and volunteers abide by the program's standards of conduct . . . [including ensuring that] no child will be left alone or unsupervised while under their care." Thus, to insure that no child will be left alone or unsupervised, Easter Seals necessarily restricted teachers' and assistant teachers' communications with picketers to nonworking time. The credible testimony, including that of Mendez, establish that Easter Seals did not place any limits on employees' ability to participate in union activities or to solicit others when it did not interfere with work time.

Moreover, there is no allegations that the policy was intended to or did discriminate against union members. As set forth above the policy applied to all employees equally and merely reinforced Easter Seals' existing expectations requiring employees to do work during working time. Accordingly, I conclude the General Counsel has not established a violation of Section 8 (a)(1).

Upon hire, Mendez admitted she received a copy of Easter Seals' personnel policies and was told by the Easter Seals to review them. Mendez then signed a note indicating that she had received and reviewed the policies. The policies, among other items, required employees to be professional in their conduct and to speak with their supervisors about issues or concerns that they might have so that Easter Seals could address them.

About a week after her hire, on or about January 31, 2003, Mendez met with Karen Rainville. Mendez admitted Rainville emphasized that she should speak with her directly if she had a problem, consistent with Easter Seals' policies. Rainville credibly testified she discussed this policy with all the new employees because of the negative and troubled history that Head Start programs had; she wanted to ensure that the program would be run in a positive, professional business-like manner. Moreover, such a policy ensures compliance with the Head Start Performance Guidelines established by the U. S. government. 45 C.F.R. § 1304.52.

On February 7, 2003, snow fell during the morning hours and Easter Seals initially required its employees to report to work. Mendez reported to work and brought her son with her to work. However, she observed the snow continuing to come down and had concerns about her daughter who was in a day care facility. Thus, after several calls to that facility, she decided to leave early to pick up her daughter. Mendez told her supervisor she was leaving early. "I told her that I, I needed as a mother, I needed to pick her up. I do not like driving in bad conditions . . . I chose to, leave—because of the conditions . . ." Thus, Mendez admits the concerns she had on February 7, 2003, and the concerns she discussed were about the driving conditions applicable to her role as a mother, not the safety conditions for her coworkers.

Following the meeting between Rainville and Mendez, two employees reported to Rainville comments that Mendez made to them while she was complaining about the snow, but before her meeting with Rainville. Specifically, they indicated that Mendez stated "I don't give a shit what they say, I'm going home" and "I'm going to have Karen Rainville's job. She doesn't know what she is doing, who hired her." Mendez denied making the first comment verbatim, but admitted that she made comments that were similar just without the profanity. Mendez also admitted to making the second comment about Rainville's job although she contended at the trial that it was made in jest.

On February 10, Mendez had a discussion with an employee, Carlos Mercado, a support service coordinator. Mendez admitted that in this conversation she told Mercado that she thought Easter Seals was being unfair to the previous staff at Head Start. Mendez admitted that she felt Martha Pappas was not fairly treated; that Pappas had two interviews and had submitted her paperwork but was not hired. Mendez felt this conversation was "just two people having different opinions."

That conversation was relayed to Belli, who then relayed it to Rainville later that day. Rainville was told that Mendez made several negative comments about Easter Seals without a factual basis and without discussing it with her supervisor, Belli or Rainville. Rainville testified she believed strongly that such conduct was inappropriate for an employee of an Easter Seals facility; because the program was just getting off the ground, Rainville wanted to ensure that a positive environment was created.

Based on what was reported to her, Rainville drafted a written warning and instructed her subordinate, Belli, to present it and discuss it with Mendez. Belli then met with Mendez. Belli then gave Mendez an opportunity to review the document and make any comments she had on it. Mendez had just a few comments and signed the written warning. No one said that Mendez could not discuss her views nor was that stated in the warning; rather testified that she, Mendez, just "felt very uncomfortable, and wanted to leave the room."[3]

At the trial Mendez did not challenge the reason why she was disciplined; in fact, she admitted that her behavior was serious enough that a verbal warning should have been issued for her conduct. Mendez also stated that if she had received a verbal warning, "it could have been settled at that moment." Thus, the only basis for the General Counsel's contention must be that the punishment was overly harsh, not whether Ms. Mendez should have been disciplined in the first instance.

In order for the General Counsel to proceed, it must show that the written warning was done to punish Mendez for pro-

[3] Mendez suggested at the trial that she did not have an opportunity to present her case to Ms. Belli because Ms. Belli gave a "nasty look." However, that testimony is belied by other portions of her testimony in which she conceded that she asked several questions about the warning including the identity of some of the people who reported the incident. She also said "fine, whatever" at the meeting as well, indicating that she had other opportunities to express her dissatisfaction with the warning. Moreover, her statements about Belli's perceived "nasty look" and "feeling . . . very uncomfortable and wanting to leave the room," are examples to me of an unusual ultrasensitive personality that I conclude seriously affects her objectivity. Her testimony, as set forth below, is replete with similar expressions of being threatened, surveilled, and discriminated against when an objective person listening to, or reading the record, would not feel threatened, surveilled, or discriminated against. I find her not to be a credible witness except where she makes admissions against her interest, or the facts are not disputed.

tected concerted activity or to discourage her from engaging in such activity. I conclude that the General Counsel has again fallen short of its burden of proof.

To be protected under Section 7, employee activity must be (a) "concerted" in nature and (b) pursued for "mutual aid or protection" of other employees. To determine whether an employee's actions were "concerted," the relevant inquiry is whether an individual employee acted with the purpose of furthering group goals. *NLRB v. Caval Tool Division Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2d Cir. 2001). Concerted activity can include some, but not all, individual activity by employees. An essential component of concerted activity is its collective nature. *Meyers Industries*, 281 NLRB 882 (1986), affd. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). In *Meyers*, an employee was only concerned about his own safety in refusing to drive an allegedly unsafe truck and such concerns were not found to be "concerted" in nature. Activities undertaken by individual employees on their own behalf are not "concerted" activity. Id.; see, *Salisbury Hotel Inc.*, 283 NLRB 685 (1987).

Concerted activity must be construed separately from the concept of "mutual aid or protection." *Meyers*, 281 NLRB at 884 (citation omitted). Generally, protests regarding the terms and conditions of employment meet the requirement. "[T] he 'mutual aid or protection' clause in section 7 includes employees' efforts 'to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'" *Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (finding that individual did not engage in protected activity with respect to efforts to change bonding requirements for companies because the link between the individual's actions and the employer-employee relationship was too attenuated) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Here, the statements and conduct for which Mendez was disciplined do not constitute concerted activity for the mutual aid and protection of others. First, Mendez' statements about the weather conditions on February 7 were not for the mutual aid and benefit of others; rather Mendez testified that they involved only her concerns as a mother. Mendez' comments indicated her personal concerns about the driving conditions because she did not like driving in snowing conditions. Thus, the comments did not refer to the concerns of her coworkers, but of herself. These types of comments are not protected and thus, I conclude that Easter Seals was justified in disciplining her for comments it believed were inappropriate.

As to her comments to Mercado, an employee, on February 10, again these comments were not made for the mutual aid and benefit of others. Rather, as Mendez herself admitted, they were merely an exchange of her opinion as part of a discussion with Mercado. She denied that she was complaining about any hiring practices, and emphasized that she was just having a conversation where two people having different opinions. Mendez plainly was not furthering any group goals. Therefore I find that Easter Seals had legitimate reasons to be concerned about the unprofessional nature of her comments, as set forth in the employee handbook, and to discipline her because of those comments.

The General Counsel has alleged that Easter Seals also issued the warning to discipline Mendez for appearing on the picket lines at Easter Seals' facility. However, the evidence demonstrated that the warning only disciplined her for her behavior on February 7th and 10th. Even Mendez understood, and admitted that the warning to be based solely on her conduct on those dates, not any appearance she made on the picket line. She further admitted that Easter Seals had legitimate concerns about her behavior and should have given her, at a minimum, a verbal warning for her conduct. There is simply no evidence that Mendez was disciplined for appearing on a picket line. Because these two sets of comments and actions for which she was disciplined do not involve protected activity, I conclude, that the warnings for those activities do not violate Section 8(a)(1) and (3) of the Act.

The Constructive Discharge

Mendez testified that the "aggravation of those past 3 days, February 10–12, really wasn't worth it."[4] Mendez then testified to various incidents on those dates that she stated led to her quitting. Cumulatively or viewed separately, I find, the incidents described by Mendez could not objectively be said to constitute sufficient "aggravation" for her to quit and therefore do not constitute a constructive discharge in violation of the Act.

On February 10, Mendez' first day of being a teacher in a classroom setting, the only aggravation she claims to have suffered was participating in the conversation with Carlos Mercado. No other incidents supporting her reason for quitting occurred on that date.[5]

On February 11, Mendez claims that the instructions given by her supervisor, regarding the rules to follow with the picket line, were also "aggravating" and led to her decision to resign. However, those rules only limited Ms. Mendez' actions during her work time. Mendez could point to no other "aggravation" on February 11, 2003, that contributed to her decision to resign.[6]

Finally, on February 12, 2003, Mendez testified that the written warning she was issued constituted "aggravation" that contributed to her termination.[7] By the next morning, Mendez was considering whether or not she should resign and that the resignation was only one of a number of options she was "playing with." However, after Malinowski, a supervisor within the meaning of the Act, visited her classroom, she decided to resign.

At that point, Mendez asked to meet with Montanye, a supervisor, with whom she was friendly and did so early in the

[4] This is another example of Mendez' unusual ultrasensitivity.

[5] Again, another example of her unusual ultrasensitivity.

[6] She also testified that she also suffered "aggravation" when various unnamed "people" at Easter Seals were also "talking about the picketers." However, Ms. Mendez could not provide any additional specifics on this and, in any event, her constructive discharge cannot rationally be based on such a vague recollection. Again these are examples of her unusual ultrasensitivity.

[7] Again, the unusual ultra sensitivity.

afternoon of February 13. Mendez testified that she wanted to resign effective immediately. She decided to resign not over the picketers but because of the "aggravation" she had suffered over the past 3 days. In other words, "it was just about how I was feeling going into Easter Seals." Montanye urged her to reconsider. Further, Montanye asked her, at a minimum, to wait until Belli's return to the office. Mendez refused and submitted a letter of resignation. Mendez testified that she understood that she still had an option of not resigning.

Mendez testified that Montanye told her not to resign. Belli testified that because the classroom has just opened that week, Mendez' resignation would place a strain on the program. Belli also testified that she did not intend for her to quit because "we had just hired her, she was good with children, she had gone on home visits and I heard a lot of good comments about her and her work." Nevertheless, Mendez still chose to resign.

The General Counsel contends that Easter Seals "constructively discharged Mendez on February 13, because of the 3 days of "aggravation," or, in the alternative, because she was presented with a Hobson's Choice. The evidence showed, however, that any "aggravation" that Mendez suffered was not related to any protected activity. Moreover, Mendez was never faced with a Hobson's Choice. Indeed, Mendez admitted at the trial that her decision to resign was, in fact, her choice and that she had a viable option *not* to resign.

Under the first theory of "constructive discharge," the General Counsel must prove two elements. "First, the burdens imposed on the employees must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Ref. Co.*, 222 NLRB 1068, 1069 (1976). It is absolutely clear, beyond any doubt, that General Counsel failed to present evidence on both elements.

Mendez testified that it was the "aggravation" of 3 days of work that forced her to resign. However, when those events are examined, those events fall far short of proving that they caused a change in her working conditions "so difficult or unpleasant" to force a resignation. Indeed, the events of February 10th and 11th—even crediting Mendez' testimony—amount to nothing more than conversations with coworkers. They certainly do not create "difficult or unpleasant" working conditions. As to the written warning on February 12, I find such a warning was entirely appropriate and supported by Easter Seals' policies. The warning did not restrict her ability to communicate with picketers and did not restrict her ability to engage in protected concerted activity. Indeed, Mendez admitted that some discipline was appropriate. The mere fact that she received a written warning instead of a verbal warning does not constitute such a drastic change in working conditions to force Mendez to resign.

Constructive discharge is difficult to prove. In *Van Pelt Fire Trucks*, 238 NLRB 794 (1978), the National Labor Relations Board refused to find a constructive discharge after employees were given repeated written warnings where the company had a policy that three written warnings could result in discharge. The Board found in that case that the written warnings were prompted by the employees' union activities and that the employer was likely trying to induce resignation. However, the Board held that the employees' "jobs did not undergo any major adverse changes, and it cannot be said that the improper warnings and other harassment made their situations 'so physically or emotionally impossible' as to license their receiving the benefits of discharge while quitting." Id. at 802 (quoting *Crystal Princeton Ref. Co.*, 222 NLRB 1068, 1069 [1976]). Accordingly, the Board refused to find the employees were constructively discharged as the second prong of the Board's test for constructive discharge was absent. See *Cent. Casket Co.*, 225 NLRB 362, 363 (1976) (holding that "even assuming [the employee] quit because he feared 'harassment and possible reprisals' or because of the threatened unlawful restrictions on his union activities . . . [his] working conditions were not adversely affected as a result of [the employer's warning]".).

In the instant case Mendez' "aggravation" over 3 days of work is clearly not sufficient to establish a constructive discharge. As the Board in *Central Casket* found, "it does not follow that an employee's quitting over a *threatened* restriction on union activity is as a matter of law on constructive discharge." Id. (emphasis added). The Board explained that "[a] threat is not the equivalent of the actual imposition of unlawful conditions of employment; it does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job." Id. (footnote omitted). In making its distinction, the Board noted "[t]he [National Labor Relations] Act provides an appropriate and direct remedy for the infringement of rights protected by Section 7 and there is nothing in it which provides that all threats unlawful under Section 8(a)(1) should or can be converted through unilateral employee action into a discharge." Because Mendez did not suffer any adverse changes in her working conditions, I conclude that Mendez was not constructively discharged.

Accordingly, I further conclude Respondent did not violate Section 8(a)(1) and (3) of the Act, as alleged.

The General Counsel also contends that it intended to show a constructive discharge by proving that Mendez was faced with a "Hobson's Choice" to forgo her right to participate in protected concerted activity or face termination. However, General Counsel did not present any evidence of this theory and, in fact, the evidence is to the contrary. To establish a Hobson's Choice constructive discharge, the choice to give up statutorily-protected rights or face termination "must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part." *Comgeneral Corp.*, 251 NLRB 653, 657–658 (1980), enf. 684 F.2d 367 (6th Cir. 1982); *White-Evans Services*, 285 NLRB 81 (1987) (and cases cited therein); *Control Services*, 303 NLRB 481, 485 (1991), enfd. 961 F.2d 1568, 975 F.2d 1551 (1992). The Board has been reluctant to find a constructive discharge where quitting was not the employee's only reasonable response. *Chartwells*, No. 3–CA–23523, *Compass Group, USA, Inc.*, 2002 NLRB LEXIS 467 (2002) (finding that employee was not given Hobson's Choice when she was given verbal warning for "intimidating" coworkers in connection with soliciting union membership).

In the instant case, the evidence at trial included admissions that are fatal to claims that Mendez was faced with a Hobson's Choice. By her own testimony, Mendez knew she had a num-

ber of options, other than resigning. First, upon receiving the written warning, she could have spoken with Rainville, and/or Belli about the situation. Second she could have filed an unfair labor charge at the time to have the written warning removed. Third, she could have consulted with the Union representative who, after all, was outside the employer's premises, about other actions that she could take. Indeed, Mendez conceded that she had a number of options. Instead, she chose to resign. Because of this, I conclude that she did not show that she was faced with a Hobson's Choice.

Coercive Behavior More Onerous Working Conditions

The General Counsel contends that Easter Seals imposed more onerous working conditions on Mendez by "monitoring her activities at Respondent's facilities" in violation of Section 8(a)(1) and (3) of the Act, in response to her alleged protected concerted activity. However, General Counsel has not proved that Mendez engaged in any protected concerted activities.

On February 12, Mendez received a written warning from Easter Seals indicating that her behavior was inappropriate and she needed to improve her conduct. Moreover, Mendez should have discussed her concerns with either of her supervisors, Belli, or Rainville. The warning then added, "Your supervisor will monitor this situation closely." The "situation" plainly referred to the disrespectful and unprofessional conduct referred to in the memorandum and the fact that Mendez needed to discuss concerns she had with her supervisors. In any event, Mendez' supervisor, Montanye, who was friendly with Mendez, would be the one to observe her performance.

General Counsel contends that after that warning was issued, Easter Seals engaged in two instances of improper monitoring. First, she contends that Belli was outside a doorway to a lounge that Mendez was in on February 12, shortly after she received a written warning. I find that Mendez' recollection of "monitoring" is not credible. Mendez conceded that Belli was outside the room for only a few minutes and that she had no idea why Belli was actually out there. Indeed, Mendez just "assumed" that Ms. Belli was monitoring her. Indeed, Belli, credibly testified that she had *not* monitored Mendez on February 12. However, even if she was outside the lounge, the evidence establishes that it was immediately next to Malinowski's office and the bathroom. I conclude that Belli's appearance for a 2-minute period outside the lounge would not be unexpected nor strange. It is quite possible that Belli was waiting to meet with Malinowski or even use the bathroom. Mendez merely assumed it was about her. Once again, I find Mendez' perception, is simply another example of her extreme sensitivity.

General Counsel also contends that on February 12, Malinowski "monitored" her activities. Mendez contends that she could not think of a reason why Malinowski would visit her classroom on February 13, and that she had never visited her classroom before. In this regard Mendez testified she merely assumed that Malinowski's visit concerned her. Again I find her testimony is not credible for the reasons stated above.

Malinowski credibly testified she did visit the Easter Seals facility as part of her usual normal routine, and in such visits she had a practice of stopping into classrooms frequently. Moreover, she testified, "for a new program opening, it's very common that she would go over in the first few days to get to know the kids, get to know the staff, the parents that may be coming in or out." With respect to Mendez, her classroom had just opened up 3 days earlier; thus, I conclude to have Malinowski visit would not be unexpected. In fact, the classroom had just opened a few days earlier and it would be entirely *expected* that Malinowski would visit.

Actual surveillance of employees' union activities can violate Section 8(a)(1), even if the employees are not aware of it. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368, 376 (9th Cir. 1941), enfg. on this point *Grower-Shipper Vegetable Assn.*, 15 NLRB 322 (1939); *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641 (D.C. Cir. 1941), enfg. *Bethlehem Steel Co.*, 14 NLRB 539 (1939); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 50 (3d Cir. 1942), enfg. on this point *Baldwin Locomotive Works*, 20 NLRB 1100, 1121 (1940). The Board, in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), set forth the fundamental principals governing employer surveillance of protected concerted activities: (1) Actual surveillance by the employer, (2) surveillance of union or protected concerted activities. See, *Electro-Voice, Inc.*, 320 NLRB 1094 (1996) (employer only liable for "closely monitoring the degree of an employee's union involvement").

In the instant case, the General Counsel has failed to establish either element. Mendez' testimony on the supposed monitoring by Belli or Malinowski is simply not credible, for reasons set forth above. There is no evidence that Belli was conducting surveillance on Mendez at most, she was merely standing outside a room waiting for a meeting or the bathroom. Moreover, I find, Malinowski's supposed visit to Mendez' classroom was exactly that, a visit to the classroom. Even if true, Malinowski could not have been conducting surveillance on any protected concerted activities because Mendez was teaching a class, not picketing. At most, the conduct alleged shows that Easter Seals merely conducted classroom observations. Accordingly, I find the General Counsel has fallen short of proving a violation of Section 8(a)(1).

With respect to the written warning, described above, I find the plain and unequivocal language of the warning states only that Mendez' supervisor will "monitor this situation." The phrase "this situation" plainly refers to the conduct alleged in the warning, none of which I have found to be protected concerted activity. Accordingly, I conclude the warning is not an independent violation of Section 8(a)(1) of the Act.

I further find that Respondent did not impose more onerous working conditions upon Mendez. Thus, I find that Respondent did not violate Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW AND REMEDY

1. Easter Seals is an employer, engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Easter Seals did not violate Section 8(a)(1) and (3) of the Act as alleged on the complaint.

Accordingly, I conclude the complaint should be dismissed in its entirety.

Dated, Washington, D.C. January 26, 2004